over the grantor's land or over the land of some other person or persons whom he cannot compel to give him any legal right of way, common sense demands that a way of necessity should be implied, so as to confer on the grantee a right of way, for the purposes for which the land is conveyed, over the land of the grantor; and it is no answer to say that a permissive method of approach was in fact enjoyed, at the time of the grant, over the land of some person other than the grantor because that permissive method of approach may be determined on the following day, thereby leaving the grantee with no lawful method of approaching the land which he has purchased."

It should be added that in order to determine whether a way of necessity has arisen the law to be applied is the same whether it is a case of a sale or a lease of land.

The vast majority of landlords and tenants in Singapore would be extremely surprised to know that by reason of operation of law, other persons may be able to enjoy a way of necessity through stores or other portions of buildings occupied by tenants, and that landlords and tenants are liable to be sued if such a way of necessity is not provided. This affords another reason for my view that an implied term must be read into the tenancy agreement between the plaintiffs and the first defendants.

If the plaintiffs had succeeded in their claim I would have made the declaration asked for by them and an order that both defendants should provide a right of way so as to enable them to have access to their store. I would not have made any award for special damages as it is obvious that, on receiving due warning of the proposal to block up the side doors, the plaintiffs should have removed their goods from the store. As to general damages, I would have awarded the sum of $3,000 against the first defendants, and the sum of $500 against the second defendants.

However, for the reasons which I have stated, the plaintiffs' claim must fail and there will be judgment for both defendants with costs.

Judgment for the defendants.

Solicitors: *L. Rayner*; *Donaldson & Burkinshaw*; *R. Ramason.*

LEONG CHEK PONG & ANOR. v. LEE CHICK YET

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) & Wylie C.J. (Borneo)) March 9, 1964]

[K.L. — Federal Court Civil Appeal No. 86 of 1963]

Contract — Oral and written contracts to mine land — Specific performance.

Specific relief — Enforcement of contract to mine land — Clause for renewal.

Mining — Tin — Use of hydraulic methods — Licence to use hydraulic methods not in possession of persons actually mining — Whether mining unlawful — Whether licence assignable — Mining Enactment (Cap. 147), ss. 90 and 91.

Mining Enactment (Cap. 147) — Discussion on.

The appellants brought an action against the respondent for specific performance of a written contract entered into by them under which the appellants were permitted to carry out mining operations on the respondent's land under a mining certificate issued to the respondent. The defence was that the appellants were not entitled to renewal of the contract, as expressly provided in the contract, by reason of having committed numerous breaches of the conditions of the agreement in connection with the working of the mine.

The evidence indicated that a licence to mine by hydraulic methods was issued to the respondent under section 91 of the Mining Enactment. The trial judge, however, held that as the appellants were working the mine they should have had such a licence issued to them and as they did not have one, they were committing a breach of the law as set out in section 90 of the enactment. He also found that certain breaches of the agreement had been committed by the appellants. In the event he dismissed the appellants' claim for specific performance. On appeal,

Held: (1) the requirement of section 90 of the Mining Enactment is not that the person who is physically working the mine should be in possession of a licence relating to employment of hydraulic methods. The requirements are that there should be in existence such a licence and the person working the mine should be doing so with the authority of the holder of the licence. This state of affairs existed in the instant case;

(2) there is no provision in the Mining Enactment prohibiting assignment of such a licence issued under section 91;

(3) on the facts there were no breaches of the agreement by the appellants;

(4) appellants were entitled to specific performance of the agreement.

Observations on local law relating to mines, p. 212.

Cases referred to:—

(1) *Archbolds Ltd.* v. *S. Spanglett Ltd.* [1961] 1 All E.R. 417, 424.

(2) *Snell* v. *Unity Finance Ltd.* [1963] 3 All E.R. 50.

(3) *Howell* v. *Falmouth Boat Construction Co. Ltd.* [1951] A.C. 837, 645.

(4) *Davies* v. *Makuna* 29 Ch. D. 596.

(5) *Woolfe* v. *Wexler* [1951] 2 K.B. 154.

(6) *Vita Food Products Incorporated* v. *Unus Shipping Co.* [1939] A.C. 277, 293.

(7) *Strongman (1945) Ltd.* v. *Lincock* [1955] 2 Q.B. 525.

(8) *Hart* v. *Hart* (1881) 18 Ch. D. 670, 685.

FEDERAL COURT.

E. K. Yeap (*Miss G. B. Yeap* with him) for the appellants.

R. H. V. Rintoul for respondent.

Cur Adv. Vult.

Thomson L.P.: This is an appeal from a decision of the High Court at Ipoh.

The respondent, who was the defendant in the original proceedings, is the proprietor of a

piece of mining land which is said to be held under mining certificate No. 3005 for Lot 43425, Mukim of Sungei Trap, District of Kinta. He also holds mining rights over an adjoining piece of land which is held under mining lease No. 12276. The details of the titles are not clear but nothing turns on this.

In the original proceedings the plaintiffs sued for specific performance of two contracts between them and the defendant. One of these was a contract in writing made on 19th September, 1962. The other was a parol contract said to have been made on 6th March, 1963. There was originally an alternative claim for damages but this was abandoned at the commencement of the trial. In the event the claim for specific performance was dismissed and against that decision the plaintiffs have now appealed.

The written contract was admitted. It describes the respondent as "the principal" and the appellants as "the contractors". It refers to the land held under mining certificate No. 3005 and goes on to recite that "for facilitating the efficient working of the said mine the principal desires that the contractors should contract to work the said mine and that the contractors have agreed to do so" upon the conditions set out in the contract.

Clause 1 provides that in consideration of payment of $1 the principal "permits the contractors....to enter upon" the land and that the contractors' undertake that the starting of engines and of mining operations shall commence within 60 days.

Clause 2 is the crucial clause as regards the present case. It reads as follows:—

"2. The term of this agreement shall be for a period of one year commencing from date hereof and shall be renewable yearly on the same terms and conditions until the land is worked out, provided always that the contractors shall have worked the said mine continuously without committing a breach of the conditions herein contained."

The remainder of the contract, which provides for payment of tribute and other matters, is not of great importance in relation to the present proceedings except clause 7 which provides that the contractors "shall work the mine in an orderly, skilful and workmanlike manner and subject to the provisions of the Mining Enactment."

The parol contract was claimed by the plaintiffs to be as described in paragraph 2 of the statement of claim which reads as follows:—

"2. By a verbal agreement entered into between the plaintiffs and the defendant on or about the 6th day of March 1963 and the defendant employed the plaintiffs also to work a part of the adjoining piece of land held under mining lease No. 12276 on the same terms and conditions as contained in the agreement dated the 19th day of September 1962 referred to above except that the defendant had to be paid 20% tribute on the tin ore obtained and sold from the 6 acre piece of land on which the defendant has a permit to mine and which land is a part of the land held under mining lease No. 12276."

The evidence regarding this parol contract was both unsatisfactory and contradictory and it will clear the approach to the main issues in the case to deal with it at this stage.

The land held under mining lease No. 12276 which adjoins the land held under mining certificate No. 3005 belongs to Dato Lau Pak Khuan who sub-leased it to one Leong Peng Khuan who by a written instrument dated 6th March, 1963, granted permission to the defendant to mine the land for a period of one year. That instrument provided that it should be renewed from year to year until the land is worked out, provided that the defendant should have worked it continuously without committing a breach of any of its conditions. It also, however, contained a provision to the effect that the defendant should not be entitled to "transfer assign or otherwise deal with this permit to mine" without the written authority of Leong Peng Khuan.

The first plaintiff said that the defendant gave him and the second plaintiff verbal permission to work this land in his name and it is clear that they did in fact work the land in conjunction with the land held under mining certificate No. 3005 and paid tribute in respect of the ore they obtained to the defendant. The defendant, on the other hand, denied that he gave the plaintiffs permission to mine the land although he admitted that he knew they were mining it and apparently took no steps to stop them and admitted the receipt of tribute.

On this the trial judge found as follows:—

"As regards the question of whether or not there was a verbal agreement dealing with mining lease No. 12276 I have come to the conclusion on a balance of probabilities that there was."

For myself I can see no reason to quarrel with this finding and would accept it. It does not, however, take the case very far. The truth remains that, although there was no doubt some oral agreement as to mining lease No. 12276, except as to the rate of tribute which was paid in respect of ore got from this land there is no evidence whatsoever as to the terms and conditions of that agreement and the allegation in the statement of claim that those were the same as the terms and conditions of the written contract relating to the land held under mining certificate No. 3005 was certainly not made out. It may be that the plaintiffs' case really is that what the defendant did was to assign to the plaintiffs his rights under the written agreement dated 6th March, 1963, between himself and Leong Peng Khuan but that was not pleaded and nobody said so in evidence and in any event those rights were not assignable without Leong Peng Khuan's

written authority of which, again, there is no evidence.

In the circumstances and on the evidence as it has been recorded there can be no question of specific performance of that agreement. It is the old, old story. If parties ask for relief they must produce evidence to support their claim and if there is no evidence their claim must fail.

Returning to the written contract, the plaintiffs went on to the land where there was already a certain amount of mining equipment belonging to the defendant. They installed additional equipment of their own and after the necessary preliminary operations to put the mine into working order they commenced to win tin ore on which month by month they paid tribute to the defendant in accordance with the contract. The actual mining operations were superintended by one Lian Kam Leong who was some sort of partner of the plaintiffs and the method used was the ordinary method of hydraulic mining used by Chinese miners. The defendant was closely in touch with what was going on and on his own admission visited the mine about 30 times during the first year of the contract, and not on 2 or 3 occasions only as was thought by the trial judge. Indeed for some time at any rate he was the manager of the mine or at any rate was regarded as such by the mines department.

In due course differences arose between the parties and in the event towards the end of the first year the defendant refused to renew the contract. The plaintiffs accordingly commenced the present proceedings on 13th September, 1963. Their claim was for specific performance and was based on clause 2 providing for the renewal of the agreement which has already been quoted.

The defence was that the plaintiffs were not entitled to renewal by reason of having themselves committed numerous breaches of the conditions of the agreement in connection with the working of the mine.

On these pleadings the case came on for trial on 27th November, 1963, and it is clear that so far as the parties were concerned at that stage the only issue, apart from the question of the oral contract with which I have already dealt, was whether or not the plaintiffs had committed breaches of the written contract and were thereby disentitled to a renewal.

At some stage of the trial, however, the judge of his own motion took the point that the contract was illegal on the ground that the plaintiffs had been committing a breach of the law as set out in the Mining Enactment by using hydraulic methods of mining without having a licence to do so and that they clearly intended to go on acting unlawfully in that regard. In the event he held that for that reason the contract was unenforceable and they were not entitled to specific performance. In case, however, he was held to be wrong, an event which he clearly regarded as unlikely, he dealt with the various allegations of breach of the terms of the agreement on the part of the plaintiffs pleaded by the defendant and found that one of these had been made out. And here I should observe that before us no complaint has been made by the defendant in relation to the judge's conclusions as to this part of the case. Judgment was accordingly given in favour of the defendant.

The appellants now say that on both the questions which he decided against them the judge was wrong.

I will deal in the first place with the judge's finding that the contract was illegal.

That finding was based on the admitted facts that the working of the mine had been by hydraulic methods, that it was clearly the intention of the plaintiffs that if the contract was renewed such methods would continue to be used and that although at all material times a licence as required by law for employing such methods was in existence that licence had been issued to and in the name of the defendant and not the plaintiffs. On these facts he took the view that the plaintiffs had "worked" the land in contravention of section 90 of the Mining Enactment and thereby committed a continuing criminal offence and that they proposed to go on committing the same offence. If that view was correct then the contract was clearly unenforceable. As was said by Devlin L.J. in the case of *Archbolds Ltd.* v. *S. Spanglet Ltd.*[1]:—

> "If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all."

At this stage it is to be observed that until a point at the trial which is not very clear there was no question of the defendant attempting to take advantage of an alleged illegality to which he was himself a consenting party. Illegality was not pleaded. Indeed it is abundantly clear that it never even crossed the minds of the parties or, for that matter, of the senior inspector of mines within whose area the mine lay, that anybody was doing anything unlawful by using hydraulic methods.

It was the judge himself who took the point though once it was raised counsel for the defendant adopted it with avidity. There was, of course, no reason why the judge should not have taken the point and, indeed once it became apparent to him it was his duty to take it (see

Snell v. *Unity Finance, Ltd.*[2]). It is nonetheless unfortunate that it was not raised on the pleadings because had counsel been aware that it was going to arise it is to be thought that they would have elicited much more detailed evidence from the parties as to just how much part the defendant had taken in the day to day management of the mine. It would also be thought they would have elicited from the senior inspector of mines, who was called as a witness, much more detailed evidence as to the extent of his knowledge as to the operation of the mine. His views on the question of illegality would not have been conclusive. As was said by Lord Simons in the case of *Howell* v. *Falmouth Boat Construction Co. Ltd.*[3]:—

"The illegality of an act is the same whether or not the actor has been misled by an assumption of authority on the part of a government officer however high or low in the hierarchy."

Nevertheless had the basis for the inspector's views been ascertained in greater detail the result might well have been helpful in the consideration of the question. Had more detailed evidence been available the question of legality or illegality would have been less difficult to determine.

The examination of that question may conveniently commence with a brief discussion of the local law relating to mines which is contained in the Mining Enactment (Cap. 147).

Section 4 relates that the entire property in and control of State land is vested solely in the Ruler, and by section 5 the Ruler may lease State land for mining purposes. The persons to whom State land may be so leased are enumerated in section 6 and include companies. Section 11 provides that where an application for a mining lease has been approved and the applicant desires to commence mining operations before the land can be surveyed the collector of land revenue may issue a mining certificate to the applicant which confers and imposes upon him all the rights and obligations of a lessee under the Enactment.

Section 14 sets out the rights of a lessee which include the right to win and got minerals (other than oil) found upon or beneath the land and to dispose of them. Section 16 sets out the conditions to be implied in every mining lease, in the absence of express conditions to the contrary, and it is to be noted that these do not include any restriction on sub-letting. That omission is probably not accidental for section 18 provides that the conditions of the lease shall be binding on a sub-lessee "and any other occupier".

I now pass on to sections 44 to 46 which provide for the issue of what are called individual mining licences permitting mining in certain specified areas. These provisions have no direct application to the facts of the present case. They are, however, relevant to the question of construction involved for by section 46(i)(b) it is provided in terms that such licences shall not be transferable. Sections 47 to 60 deal with prospecting, and here again it is to be noted that section 52 makes such licences non-transferable. Again section 113 and schedule XIX which provide for the issues of dulang passes state in terms that such passes are not transferable.

Part IX, which contains sections 77 to 94, deals with the regulation of mining operations and sections 90, 91, 92 (and section 125 in part XI) are the important sections in relation to the present case. Section 90 reads as follows:—

"Save as is provided by this Enactment, no person shall work any land by ground sluicing or gravel pumping or by any method of removing or excavating earth by the direct action of water."

Then section 91 provides that a senior inspector of mines may grant to "any person" a licence to work mining land by any of the means mentioned in section 90. This licence is required to be in the prescribed form which is set out in schedule XVIII "the form but not the substance" of which may be altered by the inspector. Section 92 provides that the inspector may cancel or suspend the licence and section 125 lays down penalties for any breach of any of the provisions of part IX.

Turning to the form in schedule XVIII we find it is headed "Licence for Hydraulic Mining". Then follow spaces to be filled in with the name of the lessee, the name of the sub-lessee (if any), the name of any transferee of the sub-lease, the name of the advancer and the number and nature of the title of the area to be mined. It proceeds as follows:—

"Permission is hereby granted to....of....to work the land described in schedule 'A' by ground sluicing for the period from....19....to....19....upon the following conditions:

1. That all tailings be deposited on the land described in schedule 'B' vide attached plan.

2. That if necessary a dam shall be erected to retain the detritus within the abovementioned limits.

3. That no injury be done to State or other land or river.

4. That this licence shall be posted in the main kongsi on the land for which it is issued.

5. That this licence shall be liable to cancellation or suspension for non-observance of any of these conditions or of any other conditions rendering it so liable."

Then follow spaces for particulars of the area to be mined and of the area on which tailings are to be deposited which is called the dumping area.

In the present case a licence in this form was issued on 7th September, 1962, the operation of which extended to 7th September, 1963. The

evidence is silent on the point and the question has not been raised by the defendant and in the circumstances it is to be assumed that further similar licences will continue to be issued.

That licence is headed with the name of the defendant as lessee and as advancer. It purports to be in respect of the land comprised in mining certificate No. 3005 and mining lease No. 12276. It then sets out that permission is granted to the defendant to work the land in question by ground sluicing upon specified conditions. The first five conditions are those set out in schedule XVIII and there is the following additional condition:—

"6. That tailing retention bunds shall not be raised by material placed on the inner side except with the written permission of the inspector, and that, on reaching the final height, perimeter bunds shall be wholly protected by established vegetation."

The arrangements between on the one hand the plaintiffs and their partners, who were, of course, their agents, and on the other hand the defendant regarding the working of the mine have already been related. The technical methods of getting the ore were the methods of hydraulic mining known as ground sluicing, and indeed it can be safely said without trespassing the normal limits on the taking of judicial notice that in the Kinta valley no competent Chinese tin miner would dream of employing any other method. The true question to be answered at this stage, therefore, is whether these arrangements and methods involved any contravention of the provisions of the Mining Enactment. Or it may be put in another way. If the licence had been in the name or names of either or both of the plaintiffs or their partner Lian Kam Leong, who actually supervised the day to day operation of the mine, would what is now said to have been unlawful have been lawful?

At first glance the answer may seem to be clear. Section 90 says that save as provided by the enactment no person shall work any land by hydraulic methods. Then section 91 says the senior inspector of mines may grant to any person a licence to work mining land by such methods subject to the conditions set out in the licence. On a strictly literal construction this may mean that no person is to work land by hydraulic methods for the purpose of mining operations, which in practice would mean no person is to do any tin mining, unless a licence has been issued to him and unless he complies with the conditions set out in the licence. On such a literal construction it would probably be wrong to say that all that sections 90 and 91 mean is that no person shall work land by hydraulic methods except in accordance with the provisions of a licence issued by the inspector of mines, irrespective of whether such licence was issued to himself or to some other person.

But is such a strictly literal construction the correct one? If it is correct it gives rise to very considerable difficulties of practical application.

In the first place it is incredible to suppose that the legislature intended that the expression "work" should be interpreted literally in the sense of including every physical act involved in the application of hydraulic force to the earth's substance with a view to its disintegration and asportation. On this view if a licence were issued in the name of a mine owner then only he himself would be legally entitled to carry out any of the physical operations involved in mining. Or, alternatively, it would be necessary for a licence to be issued in the name of every one of his labourers each of whom would be guilty of a criminal offence if tailings were deposited in the wrong place and dams were not built and so forth. If these results are so clearly absurd as to lead to the conclusion that working means something other than personally performing all the operations necessary to obtain ore by hydraulic methods where does the line fall to be drawn? How far do you go? Is working lawful if the licence holder does the physical work by his servants? If so must his servants work under his own immediate direction or may the physical work be done by his servants working not under his immediate direction but under the immediate direction of a manager employed by him? May the land be worked on the licence holder's behalf by an agent or a partner? And if so, must the contract of agency or partnership contain any specific provisions regarding the extent to which he may govern the working? Or may the land be worked, as was done here, by any person authorised by the licence holder to do so, always provided that it is worked in accordance with the conditions of the licence?

It would be wrong to attempt to answer all these questions and so to frame an exhaustive statement of what the law means for this would be to re-write the law, and that is the business of parliament. It would be wrong to go an inch further than is necessary for a decision of the present case. There are, however, certain considerations which assist in that decision.

In the first place it is to be observed that the Mining Enactment lays down in terms that certain licences issued under it are not transferable. The provisions in question are those of section 46 relating to individual mining licences, those of section 52 relating to prospecting licences and those of section 113 and schedule XIX relating to dulang passes. There is no such restriction in terms applied to hydraulic licences issued under section 91 and the absence of any such restriction would at the lowest suggest that none was intended.

In the second place, there is nothing in the Enactment which restricts the issue of licences to persons holding any personal qualification in the way of skill or knowledge or training. In relation, for example, to the practice of medicine or dentistry the law may restrict the practice of these occupations to persons of proved skill and the object is clearly to protect the public from dealing in ignorance with persons who do not possess such skill (see, e.g. *Davies* v. *Makuna* [4]). There is, however, nothing of the sort here. It is true that under section 91(iii) the inspector of mines has a certain discretion to vary the conditions of licences but the conditions of a licence as set out in schedule XVIII in no way relate to the personal qualifications of the holder and the inspector is forbidden to vary these conditions in substance. In particular there is nothing in the enactment which would have prevented the plaintiffs obtaining a licence had they asked for it.

Again, none of the conditions set out in the form contained in schedule XVIII relate to methods of mining. They are all designed to protect neighbouring land. Tailings are to be deposited on a prescribed area, a dam is to be erected to retain detritus within that area, no injury is to be done to any other land or any river.

Finally it is to be observed that the licence does not permit the doing of anything which would otherwise be unlawful by the general law of the land. It permits the use of hydraulic mining methods, but it does not permit a man to go on to his neighbour's land without his neighbour's authority and commence working it by hydraulic methods, or indeed any other methods, for to do so would be a trespass. In other words, it only permits a relaxation of the prohibition which the Enactment itself imposes by section 90. This would seem to point to the conclusion that the intention of the legislature was to control the use of hydraulic mining methods by a party on land which he would otherwise be entitled to mine in the interests of neighbouring land first of all by imposing a general prohibition and then by relaxing that prohibition in the case of individual pieces of land subject to defined conditions designed to protect other land. And it is to be observed that a breach of these conditions is an offence by any person irrespective of whether or not he is the holder of the licence.

For all these reasons I do not think there was any breach of the law here when the plaintiffs and their partner were conducting mining operations on the defendant's land with his permission and in accordance with the provisions of his hydraulic licence or in the defendant permitting them to do so.

I find some small support for these views in the case of *Woolfe* v. *Wexler*.[5] That case arose under the emergency legislation at the time in force in England relating to building licences and in particular concerned a defence regulation which provided that the carrying out of any work on a building should be unlawful except in so far as there was in respect thereof a licence by the minister. A licence covering certain proposed work had been issued but not in the name of the person for and at whose expense the work was actually done and it was held that as there was no express requirement in the regulation that licence to work must be in the name of the person at whose expense the work was carried out the licence was not invalidated and the work was not rendered illegal. The case is, of course, by no means on all fours with the present one but it is to be noted that on the question of interpretation involved the Court of Appeal were guided at least to some extent by the view they took of the object of the regulation with which they were concerned. They said (*per* Cohen L.J. at p. 163):—

> "The policy of the regulation is to prevent work of a kind or at a cost not covered by a licence, or, we think for a purpose not covered by a licence. We do not consider that this policy requires that the name of the person paying for the work should be stated in the licence. On the other hand, it seems to us natural to impose the penalty on the person at whose expense the work is being done, since he must be in a position to control the builder and prevent unauthorised work from being done."

Having come to that conclusion on the illegality question it becomes necessary to deal with the other part of the case, that is the judge's findings that in the course of their mining operations the plaintiffs allowed effluent water to flow from the mine on to land other than the "dumping area" described in the hydraulic licence, that this was a breach of the law and that it was not mining in an orderly, skilful and workmanlike manner. If these findings stand it means there was a breach by the plaintiffs of clause 7 of the written contract which provides that the contractors (i.e. the appellants) "shall work the said mine in an orderly skilful and workmanlike manner and subject to the provisions of the Mining Enactment" and clause 2 which makes compliance with the provisions of the contract itself a condition precedent to its renewal.

The evidence here is not as clear as it might be. From such evidence as there is, however, it would appear that the detritus, that is to say the mechanical mixture of disintegrated soil and water from the mine, was allowed to flow on to a portion of the dumping area prescribed by the hydraulic licence. There was, of course, nothing unlawful in this. This portion of the dumping area is a roughly circular area of about 400 yards in diameter which contains an excavation result-

ing from previous mining operations. From a point on the circumference of this area, roughly opposite the point of entry of the mine detritus, a ditch was cut across adjoining pieces of land belonging to the defendant and to Dato Lau Pak Khuan respectively through which water was allowed to flow from the dumping area back on to the mine where it was used in connection with the hydraulic operations which have already been described. This dealing with the water from the dumping area was done with the knowledge and agreement of everybody concerned. So far as Dato Lau was concerned at some time (his letter is undated) he gave written permission to the plaintiffs to take water across his land. As far as the defendant and the mines department were concerned the ditch was shown on the plan signed by the defendant and submitted by him to the mines department when he applied for his hydraulic licence. Both he and the inspector of mines were familiar with the mine and it is impossible to suppose that either of them should have visited it without observing the source of the water which was essential to its operation.

The trial judge dealt with the question in the following passage:—

> "I think I am right in saying that to allow effluent water to flow from the mine on to the land of others or rather to put it more simply on to land other than the land covered by the hydraulic mining licence and the dumping on lands other than those shown for dumping purposes is a breach not only of the Mining Enactment and the regulations made thereunder but in my opinion a breach of clause 7 in that it was not mining in an orderly skilful and workmanlike manner. I do not think it makes any difference to whom the land belongs. I do not think it is an excuse to say dumping had taken place on somebody else's land but he has not complained."

With great respect I do not think what is said here is in accordance with the evidence.

In the first place, if by "dumping" is meant the deposit of something other than water there is no evidence whatsoever to show that, apart of course from tin ore, anything from the mine except water passed in any way on to any land outside the dumping area. In the second place it seems reasonably clear that all the water which passed from the dumping area on to and through the adjoining land did not come from the mine, though some of it no doubt did. There was no question of any pumping arrangement. The water proceeded by force of gravity and the natural drainage of the land must obviously follow the channels which gravity dictates.

And in the third place the Mining Enactment does not contain any general prohibition against an occupier of mining land allowing "effluent water" to flow on to land other than the land shown on his hydraulic licence as a dumping area. The only prohibition is contained in section 74(ii) which reads as follows:—

> "No occupier of mining land shall allow effluent water from any mining area under his control containing solid matter in excess of the amount prescribed by rule to discharge into any river or natural watercourse or otherwise to pass beyond his control."

The relevant rule is rule 13(i) of the Mining Rules, 1934, which reads as follows:—

> "No person shall permit effluent water to pass beyond his control containing more than 800 grains of solid matter per gallon, or such other number of grains and size of solid matter per gallon as the Mentri Besar may, in writing, direct."

There is not a scrap of evidence here as to the solid content of the water which passed on to the adjoining land. On the other hand both the plaintiff and his partner who is in charge of mining operations said it was clear water. The onus was on the defendant to prove that the water was such as came within the scope of the section and that onus was not discharged. It is true that it was a condition of the hydraulic licence that a dam should be erected to retain the "detritus" from the mine within the dumping area but it has not been argued, and for myself I do not see that it could be argued, that detritus includes water without some admixture of solid matter and as to the extent of that admixture surely the conditions of the licence are to be read in the light of the section and the rule which have been quoted.

Again there was not a scrap of evidence that the water passed beyond control. Indeed the evidence was all the other way, it was to the effect that the water passed through ditches specifically designed to control it and to guide it to its destination which was the mining land.

Finally I can find nothing, not even any expert evidence, to support the view that this dealing with the water could be stigmatised as not being orderly, skilful or workmanlike. There was no breach of the statute law. There was no infringement of the rights of neighbouring landowners without their permission. Water was essential for the working of the mine and in the absence of any evidence, or even argument, I am not prepared to say there was anything disorderly or unskilful or unworkmanlike in getting it in this particular way.

I would, therefore, allow the appeal with costs and give the appellants an order for the specific performance of the written contract. Unless they can come to some agreement with the respondent on the point they will have to vary their mining operations to avoid encroaching on the land comprised in mining lease No. 12276 but on the evidence that will present no difficulty. If it reduces their profits that is the price they will have to pay for not having made a more business-like arrangement regarding that land.

Wylie C.J. (Borneo): I agree with my Lord President that, on a proper view of all the relevant provisions of the Mining Enactment, sections 90 and 91 do not require that a hydraulic licence must be held by any specific person and I agree with his reasons for this conclusion. I also agree with his view that there had been no breach of clause 7 of the contract.

So far as concerns the main issue, section 90 merely prohibits hydraulic working except as provided elsewhere in the Enactment, and section 91 provides for the circumstances under which hydraulic working is permitted. This permission is signified by granting a licence to work mining land by hydraulic means. The important features are that a licence has been granted to work a specified area of land by these means, and that the use of these means is controlled by conditions and by the issue of a licence which, under section 92, may be cancelled or suspended for failure to observe or comply with the conditions of the licence or upon proof of injury to the rights of others by reason of the mining operations. The object of the legislation is achieved in this manner and the identity or qualifications of the person to whom the licence is granted, do not seem to be material to that object. As the Lord President has pointed out, the Enactment imposes no restriction on the transfer of these licences, which is in marked contrast to the provisions restricting the transfer of individual mining licences and dulang passes. This contrast supports the obvious inference that the identity or qualifications of the holder of a hydraulic licence are not considered of importance.

Moreover, although section 91 provides that a licence may be granted to "any person", normally it would be pointless to grant a licence to any one other than the lessee or sublessee. For this is the only person who possesses a legal right to work the land specified in the licence for mining purposes, whatever method is to be used, and whoever is to be employed in operating the mine. That is not to say, however, that where no licence for hydraulic mining had been issued in respect of land included in a particular mining lease and the lessee had entered into a contract with a person to carry out the mining operations as an independent contractor, the section would prevent the issue of the licence to the contractor. However, those were not the circumstances in the present case.

Even if the view of the trial judge were correct — namely, that the contractors in the present case must hold a hydraulic licence in their own names — it does not necessarily follow that the appellants cannot succeed in these proceedings on the ground of illegality. There is no specific reference in this contract to the hydraulic licence at all and there is nothing in the document to suggest that the parties have bound themselves, or even intended, to carry on the mining operations by any specific means, hydraulic or otherwise, or that, if hydraulic means were to be used, the only licence under which this was to be done, had to be held in the name of the respondent. The fact is that nobody, not even the mines department apparently, had ever thought that there was any breach of the law in the appellants' operating under the respondent's licence, until the point occurred to the judge. Consequently, there is no evidence of any deliberate intention to contravene the Enactment, if it did require the licence to be in the appellant's name. So far as the record is concerned, there is no reason to doubt that, if this point had occurred to the parties before they fell out. the hydraulic licence would have been transferred to the name of the appellants, or one would have been obtained in their name. Clause 18 of the contract (referred to later in this judgment) might well have placed the respondent under some obligation in such circumstances.

The appellants have operated for one year under the contract. For over two months, they were installing plant and preparing the mine for operations. A partner, in evidence which is not contradicted, claimed that the cost of the initial outlay was $41,000. The evidence given concerning the production from the mine is to the effect that the first sales were in February 1963 and that they increased steadily in subsequent months, indicating that, as is to be expected, the appellants would obtain their return from this venture over the years ahead, until the land was worked out, provided that they were entitled to their annual renewal. And, apart from this question of illegality, the court now considers they were so entitled in respect of the renewal for the second year.

Moreover, the contract indicates an intention on the part of the appellants and respondent to impose on the respondent the responsibility of ensuring that all licences were in order. For clause 18 reads as follows:—

> "The principal [that is, the respondent] shall be responsible to apply for the renewal of all licences that may be necessary for the continued mining operations of the said mine."

In fact, the evidence establishes that it was the respondent who applied in November 1962 to the inspector of machinery for permission to instal the necessary machinery in the mine. The hydraulic licence expired on 6th September, 1963, and, pursuant to clause 18, if the contract was renewed, the onus would be on the respondent to obtain a valid renewal of the licence. If the only manner in which that could be done consistently with the rights the respondent had granted to the appellants under the contract, is by having the licence issued in the name of the appellants, then he would not be discharging his

obligation under clause 18, unless he arranged for this. For that clause obviously binds him to obtain such renewals as are necessary for the purposes of the contract.

In the light of these circumstances I feel compelled to bear in mind the warning on this question of avoiding contracts on account of illegality given by Lord Wright in the Privy Council decision in *Vita Food Products Incorporated* v. *Unus Shipping Co.*[6] where he said:—

"Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."

There can be no doubt that public policy in the wider sense will be badly served in the circumstances of this case, if the state of the law is such as to require this contract to be nullified in the foregoing circumstances merely because this hydraulic licence was not in the name of the appellants.

These considerations must be viewed also in the light of the further circumstance that, in these proceedings, no claim is made by appellants in respect of the first year's operations, when, if the view of the learned trial judge is sound, the operations were carried on unwittingly by the parties in contravention of the requirements of the Enactment. The claim is directed only to the future, for the principal claim is for specific performance, with an alternative claim for damages, if specific performance is not decreed. A common law claim for the appellants' share of the price obtained for tin produced during the first year of operations, if those operations had been carried out in contravention of the Enactment, might fail. See *Strongman (1945) Ltd.* v. *Lincock.*[7] It is quite a different matter where the only claim is for specific performance of a contract which has been part performed to the extent that this contract has, and future performance of which can take place without contravention of the Enactment. Equity leans heavily in favour of ordering specific performance where the claimant has fulfilled his part of the contract to the extent that the appellants have here and both parties have acted under the contract for a considerable period. See *Hart* v. *Hart* [8] per Kay J.:—

"....when an agreement for valuable consideration has been partially performed, the court ought to do its utmost to carry out that agreement by a decree for specific performance."

As I have already pointed out, the hydraulic licence expired on 6th September, 1963, shortly before the end of the first year of operations under the contract, which occurred on 18th September, 1963. Pursuant to clause 18, the respondent must obtain a renewal in a form that is consistent with his obligation under the contract to permit the appellants to work this mining lease. Consequently, even if the judge's view of the Enactment were sound, I see no reason to take the view that continued operations under the contract would necessarily involve these alleged contraventions of the Enactment. In my judgment, therefore, it would not be proper in the circumstances of this case to refuse an order for specific performance of this contract for illegality for the reason that the hydraulic licence in force during the first year of operations was not held in the name of the appellants, even if that had been in contravention of the Enactment.

For this reason also, I would allow this appeal with costs both here and in the court below, and grant a decree for specific performance in respect of the written contract.

I agree with my Lord President that there can be no such order in respect of mining lease No. 12276 for the reasons given by him.

Appeal allowed.

Solicitors: *Yeap & Yeap*; *Shearn, Delamore & Co.*

WEE HOCK GUAN v. CHIA CHIT NEO & ANOR.

[O.C.J. (Winslow J.) April 17, 1964]
[Singapore — Divorce No. 48 of 1962]

Divorce—Adultery—Allegation of—Evidence—Onus and quantum of proof.

An allegation of adultery must be proved beyond reasonable doubt. The evidence must go beyond establishing suspicion and opportunity to commit adultery and must be such as to satisfy the court that from the nature of things adultery must have been committed; where the evidence is entirely circumstantial the court will not draw the inference of guilt unless the facts relied on are not reasonably capable of any other explanation.

Case referred to:—

(1) *Farnham* v. *Farnham* (1925) 133 L.T. 320.

DIVORCE PETITION.

G. Murugaiyan for the petitioner.

Chan Sek Keong for the respondent.

Robert Hsieh for the co-respondent.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Winslow J.: In this case, the petitioner, Mr. Wee Hock Guan, a cashier at the Ocean Park Hotel, asks for dissolution of his marriage to his wife, Madam Chia Chit Neo, on the ground of her adultery with the co-respondent, Mr. Chiam Kim Joo, a schoolmaster.

It is well established that an allegation of this nature must be proved to the satisfaction of the Court beyond reasonable doubt and that the